Supreme Court, U.S.
FILED

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No.:

In the Supreme Court of the United States

MICHAEL LEWIS GAGLIARDI,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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42 pp

QUESTION PRESENTED FOR REVIEW

1. Were the Petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution violated when an Alabama state court accepted his plea of guilt without evidence that a sworn information or indictment was ever entered against him?

PARTIES TO THE PROCEEDINGS BELOW

The only parties to the proceedings below are the Petitioner-Appellant, Michael Lewis Gagliardi, and the State of Alabama.

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CITATIONS TO OPINIONS BELOW

The decision of the Supreme Court of Alabama, dated April 27, 2001, denying Petitioner's motion for a Writ of Certiorari to the Alabama Court of Criminal Appeals is unreported and is included herein at App. 1.

The decision of the Alabama Court of Criminal Appeals, dated January 12, 2001, affirming the decision of Alabama District Court, Tenth Judicial Circuit, Jefferson County, is unreported and is included herein at App. 2-7.

The decision of the Alabama District Court, Jefferson County, dated April 19, 2000, denying Petitioner's motion for relief pursuant to Ala. R. Crim. P. 32, is unreported and is included herein at App. 8-10.

The decision of the Alabama Court of Criminal Appeals is reported at State v. Gagliardi, 747 So. 2d 366, 367 (Ala. Crim. App. 1999) and is included herein at App. 11-14.

The decision of the Alabama Circuit Court, Jefferson County, dated December 18, 1998, granting Petitioner's motion for relief pursuant to Ala. R. Crim. P. 32, is unreported. The transcript of proceedings and the order issued from the bench is included herein at App. 15-25.

STATEMENT OF JURISDICTION

The judgment of the Alabama Court of Criminal Appeals which is sought to be reviewed was entered on January 12, 2001. The order of the Alabama Supreme Court denying to grant a writ of certiorari was entered on April 27, 2001. This petition is filed within ninety days of April 27, 2001.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

This case involves the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . .

U.S. Const. amend. VI.

This case also involves Section I of the Fourteenth Amendment to the United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of law.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

In 1991, Mr. Gagliardi was denied his constitutional right to be properly informed of the charges against him when he was convicted of robbery in the second degree by the District Court of Jefferson County. When Mr. Gagliardi was arrested in 1991, the District Attorney failed to file an Information or Indictment informing Mr. Gagliardi of the charges against

him. Despite the fact that the District Court was without jurisdiction because Mr. Gagliardi had not been formally charged with any crime, as required by both the United States and Alabama constitutions, the court accepted Mr. Gagliardi's plea of guilt.

It is fundamental that a criminal defendant enjoys a fundamental constitutional right to be formally informed of the charges levied against him. Indeed, a formal presentation of charges is a prerequisite to the trial court's jurisdiction over the defendant. In this case, the State readily admitted in the court below that there is no direct evidence that an Information was filed in this case. Moreover, despite the clear mandate from the Alabama legislature and the Supreme Court of Alabama that criminal files be permanently maintained, there is no Information or Indictment in the Clerk's file for this case. Therefore, it is clear that as a result of the District Attorney's failure to formally present Mr. Gagliardi with the charges brought against him, the District Court was without jurisdiction to render judgment and impose sentence upon Mr. Gagliardi. Thus, his conviction must be declared null and void.

On March 15, 1991, Mr. Gagliardi appeared in the District Court of Jefferson County before Judge Jack Montgomery to enter a plea of guilty to second degree robbery. Without any evidence that an Information or Indictment was filed with the Court, Judge Montgomery accepted Mr. Gagliardi's guilty plea and sentenced him to 15 years, 2 years to actually be served in a jail or institution, the remainder suspended with probation for two years. See App. at 2.

Mr. Gagliardi never appealed from the judgment of conviction. See App. at 2. On May 21, 1998, however, Mr.

Gagliardi filed a petition for post-conviction relief pursuant to Alabama Rule of Criminal Procedure 32 in the Circuit Court of Jefferson County for relief from a 1996 conviction. In that petition, he claimed that the 1991 conviction was not valid for want of jurisdiction and could not be used to enhance the sentence for his 1996 conviction. The State argued that because the District Attorney's office had a copy of a blank Information in its file, *a fortiori*, one was filed with the Clerk of the District Court. See App. at 18. Indeed, the contrary is true. There is no direct evidence in the Clerk's file or in the transcript of Mr. Gagliardi's plea of guilt that an Information was filed in this case.

On December 18, 1998, the Jefferson County Circuit Court held that because the State could not make an affirmative showing that an Information was filed, Mr. Gagliardi's 1991 conviction was not valid. See App. at 24. The court later held that Mr. Gagliardi's 1996 sentence was improperly enhanced and therefore invalid. The State appealed. On appeal, th Alabama Court of Criminal Appeals reversed the decision below, holding that because Mr. Gagliardi's 1998 post-conviction relief petition was a collateral attack on the validity of his 1991 conviction, the petition should have been filed in the District Court of Jefferson County, Alabama, the court of original jurisdiction. See App. at 14; State v. Gagliardi, 747 So. 2d 366, 367 (Ala. Crim. App. 1999).

In accordance with this Court's directions, on December 30, 1999, Mr. Gagliardi filed in the District Court of Jefferson County, Alabama, a Petition for Relief from Conviction or Sentence (the "Rule 32 Petition") challenging his 1991 conviction on the ground that he was not properly informed of the charges brought against him by the District Attorney. After hearing oral argument, and reviewing supplemental

briefing, the District Court denied Mr. Gagliardi's Rule 32 petition.[1] See App. at 8-10. The State appealed, and the Alabama Court of Criminal Appeals affirmed the District Court's decision. See App. at 2-8.

In its written opinion, the Court of Criminal Appeals expressly points out that a certified Information does not exist in the court's file for Mr. Gagliardi's case. See App. at 5, ¶ 2. The court also expressly acknowledges that there is no reference to a certified Information in the colloquy between the trial court and Mr. Gagliardi at the time that his plea was taken. See App. at 6, ¶ 3. Instead, the Court of Criminal Appeals relies on language located in a pre-printed, boilerplate *Explanation of Rights and Plea of Guilt* form to support the State's contention that an Information was filed. See id. In addition, the Court of Criminal Appeals cites to the District Attorney's alleged retention of an *unsigned, uncertified* Information as further support that a sworn Information was filed against Mr. Gagliardi in this case. See id.

The Court of Criminal Appeals's reliance upon a boilerplate form and the slipshod practice of the District Attorney not to keep a photocopy of the constitutionally mandated Information is clearly misguided. A criminal defendant's right to a formal presentation of charges is fundamental. Moreover, it cannot be waived. Thus, despite the fact that Mr. Gagliardi appeared before the court to enter a plea of guilt, the District Attorney was not relieved of his duty to file a signed, sworn Information. Accordingly, because no Information was ever filed in this case, the District Court of Jefferson County was without jurisdiction to impose

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[1] The oral argument was not recorded.

sentence upon Mr. Gagliardi. The sentence imposed must be declared null and void.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE ALABAMA COURT OF CRIMINAL APPEALS CONFLICTS WITH FEDERAL CONSTITUTIONAL LAW

A criminal defendant's right to be apprised of the charges being brought against him is one of the most basic in a civilized society. In order to ensure due process of law, the constitutions of the United States and of the State of Alabama require the State to formally inform criminal defendants of the charges brought against them. See Smith v. O'Grady, 312 U.S. 329 (1941); Butler v. Alabama, 130 Ala. 127, 30 So. 338 (1901); Miles v. Alabama, 94 Ala. 106, 11 So. 403 (1889).

The Sixth Amendment to the United States Constitution mandates that criminal defendants are guaranteed the right to be informed of the nature and cause of the accusation made against them. See U.S. Const. amend. VI; Gannett Company, Inc. v. DePasquale, 443 U.S. 368, 379, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). This provision of the Sixth Amendment has been made applicable to the States by reason of the Fourteenth Amendment. See Argersinger v. Hamlin, 407 U.S. 25, 27 (1972). Indeed, "the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'" Powell v. Alabama, 287 U.S. 45, 68 (1932) (quoting Holden v. Hardy, 169 U.S. 366, 389 (1898)). In addition, the due process clause of the Fourteenth Amendment itself provides the accused with the "clearly established"

right to notice of the charges and a "chance to be heard in a trial of the issues raised by that charge." See Cole v. Arkansas, 333 U.S. 196, 201 (1948); see also U.S. Const. amend. XIV; In re Oliver, 333 U.S. 257, 273 (1948).

These principles apply with equal weight where a defendant pleads guilty to a felony. Indeed, this Court has cogently stated that "[a] person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court. Albrecht v. United States, 273 U.S. 1, 8 (1927) (emphasis added). See also Ford v. Alabama, 612 So.2d 1317, 1321 (Ala. Crim. App. 1992) (holding that the requirement for a formal accusation "by Indictment, or Information, or complaint supported by oath is essential to complete jurisdiction [over the person], and cannot be waived."); Ross v. Alabama, 529 So. 2d 1074, 1078 (Ala. Crim. App. 1988) ("the constitutional requisition of Indictments . . . is so imbued with the public concern for due and proper administration of the law that no individual may waive it") (quoting Kennedy v. State, 39 Ala. App. 676, 690, 107 So. 2d 913, 926).

In this case, there is no indication that Mr. Gagliardi was properly apprised of the charges against him when he entered his plea. There is no evidence that the district attorney ever signed and swore out an Information, much less that one was ever filed with the District Court of Jefferson County. As the lower court noted, nowhere in the transcript of Petitioner's plea is there any mention of an Information or Indictment. See App. at 5, ¶ 2. Nor is there any record on the docket sheet of any Information having been filed with the Clerk of the District Court. See 22-23. The District Attorney, the District Court and the Court of Criminal Appeals rely only on boilerplate forms and a self-serving affidavit from the District

Attorney to support Petitioner's conviction. See App. at 3. Such evidence simply does not meet the strict statutory and constitutional requirements necessary to obtain jurisdiction and validly accept a guilty plea. See Ross 529 So. 2d at 1078.

Indeed, it is conspicuous that the District Attorney's affidavit does not state that an Information was filed in this case. Rather, the District Attorney states only that it is general practice to file Informations when felony pleas are taken. See App. at 4-5. This is not a case, however, where an Information was filed and then lost or misplaced -- *there is simply no indication on the clerk's docketing page that one was ever filed.* See App. at 22-23. The State's citation to an unsigned, unsworn, unfiled Information does not meet the constitutional burden that it must carry before a citizen can be convicted of an alleged crime. In fact, it stretches the imagination to conceive that the Alabama District Attorney's office does not keep photocopies of the Informations it files in court, but keeps unsigned, unsworn forms instead.

The State's failure to formally inform Mr. Gagliardi of the charges against him renders Mr. Gagliardi's 1991 conviction and sentence void. Therefore, the Court of Criminal Appeals' opinion should be overturned. Indeed, the Circuit Court of Jefferson County already determined, albeit without jurisdiction, that the 1991 conviction is invalid. See App. at 24. And the Court of Criminal Appeals did not disagree with that determination upon first reviewing this case. See App. at 11-14; State v. Gagliardi, 747 So. 2d 366, 367 (Ala. Crim. App. 1999).

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully submits that the judgment of conviction is due to be declared null and void. The Petitioner respectfully requests this Court to grant a writ of certiorari to the Alabama Court of Criminal Appeals, and, upon review of the matters herein, to reverse the decision of the Court of Criminal Appeals and hold that the District Court of Jefferson County was without jurisdiction to issue judgment and conviction upon the Petitioner and therefore declare the conviction null and void.

Respectfully submitted,

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Ex Parte Michael Lewis Gagliardi, Low'r App. Ct. No. CR-99-2076 (Ala. Apr. 27, 2001) 1

Gagliardi v. Alabama, No. CR-99-2076 (Ala. Crim. App. Jan. 12, 2001) 2

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IN THE SUPREME COURT OF ALABAMA
April 27, 2001

1000925

Ex parte Michael Lewis Gagliardi. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Michael Lewis Gagliardi v. State of Alabama) (Jefferson Dis. Ct. No.: DC-91-842.60) (Low'r App. Ct. No.: CR-99-2076)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted. IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied. NO OPINION.

COSTS TAXED TO THE PETITIONER

STUART, J. - Moore, C.J. and See, Brown, and Harwood, JJ., concur.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

MEMORANDUM

CR-99-2076 Jefferson District Court No. DC-91-842.60

Michael Lewis Gagliardi v. State of Alabama

LONG, Presiding Judge.

AFFIRMED. On March 15, 1991, the appellant pled guilty, in the Jefferson District Court, to second-degree robbery. The district court sentenced him to serve fifteen years in prison, but split the sentence and ordered him to serve two years in prison followed by two years on probation. The appellant did not appeal his conviction. However, on December 30, 1999, he filed a Rule 32 petition, challenging his conviction. After the State responded, the district court denied the petition. This appeal followed.

The appellant argues that his conviction is void and that the district court did not have jurisdiction to accept his guilty plea in this case. He bases these arguments on the contention that the district attorney did not file an information or an indictment in this case charging him with a crime.[1] In re

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[1] The appellant also argues that "[t]he District Court Clerk has a responsibility to maintain criminal case files forever." (Appellant's brief at p. 9.) In support of this contention, he cites Rule 28, Ala. R. Crim. P., which provides: "All records and (continued...)

sponding to the petition, the State submitted an affidavit from the Jefferson County District Attorney in which the District Attorney stated:

> "I, David Barber, being over the age of 21 years, and of sound mind, do affirm the facts stated herein:
>
> "1. That I have been the duly elected District Attorney since 1984 for the Tenth Judicial Circuit. In March of 1991, I was the duly elected District Attorney for said Circuit.
>
> "2. My office makes offers on felony cases and enters into agreements for resolutions of those cases in District Court. It is our policy that the Deputy District Attorney (DDA) in the District court, where the charge is pending, has a legal secretary type up an Information; when notified by the Court of a defendant's intent to plead guilty. The legal secretary types up two (2) copies of the Information. The DDA signs my name in the appropriate blank and then signs their own in the affidavit blank. Our notary witnesses this and affixes his/her seal. On the plea day, the DDA

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[1] (...continued)
evidence of the proceedings must be retained according to the records retention schedule approved by the Alabama Supreme Court." Although he attaches a copy of a records retention schedule to his brief to this court, he did not include a copy of that schedule in his petition or otherwise present it to the district court. Therefore, he did not satisfy his burden of pleading and proving that the district court did not comply with the requirements of the relevant records retention schedule. See Rules 32.6(b) and 32.3, Ala. R. Crim. P.

presents the signed and notarized copy to the Court and the unsigned copy is retained in our file. This has been our policy since I have been the District Attorney for the Tenth Judicial Circuit.

"3. At my direction I had our office file of Mr. Michael Lewis Gagliardi searched. Among other things found we were three documents, of which copies have been attached (Barber Affidavit: Exhibits, A, B and C). Exhibit A is the Information for Michael Lewis Gagliardi in DC91-842. Exhibit A is consistent with an unsigned Information that is retained in our files when an Information plea is done. The only logical reason for this document to have been in our files, would be that an Information had been prepared for this case. Exhibit B is a copy of the original 'Court's Notice to District Attorney of Defendant's Desire to Plead Guilty' that was found in our files. It is signed by the late Judge Jack Montgomery, the Honorable Ron Harris (Counsel for the Defendant), and the Defendant Michael Lewis Gagliardi. This document is the instrument that the Court serves notice upon our office to prepare an Information. It is the same document that the DDA gives to the legal secretary to have the Information typed. Exhibit C is a copy of the original 'Defendant's Intent to Plea guilty Without an Indictment.' Again, it is signed by the defendant and his counsel. The original of this form should be in the Clerk's file.

"4. I am not aware of any cases, in my fourteen (14) years as a District Attorney, where a felony plea was taken in District Court without my office filing an Information with the Court. This practice is in-

structed to every DDA that is assigned in District Court and to every legal secretary that works in our District Court office.

"I know of no reason that an unsigned copy of an Information would be in our file (when a guilty plea on a felony was taken in District Court) unless a signed copy of the Information had been presented to the District Court Judge taking the plea."

(C.R. 31-32.) After reviewing the petition, the State's response, the district court record, and the transcript of the guilty plea colloquy, the district court found as follows:

"This cause coming before the Court on Defendant's Petition for Relief Under Rule 32, Alabama Rules of Criminal Procedure and the State of Alabama's responses thereto, argument presented and briefs received from both parties, the Court finds as follows:

"1. The issue presented in this case is one of jurisdiction due to the record of conviction in DC 91-842 failing to contain a properly certified information for a grand jury indictment.

"2. That both the State of Alabama and the Defendant agree that a certified 'information' is not presently in defendant's record. The State argues that said information was referred to in several other related documents made a part of Defendant's plea and also that an unsigned information is, in fact, in the District Attorney's file indicating that at the time of the plea, an information was, in fact, in Defendant's

file and that is sufficient to satisfy the question of jurisdiction and meets the requirement of The Trial Courts Record Retention Schedule. The Defendant argues that the requirement is specific and cannot be met indirectly by reference to other documents and that a certified information must actually be permanently retained in Defendant's record.

"3. The Court reviewed the record of the colloquy between the Court and the Defendant when the plea of Defendant was taken and there is no direct reference by the Court concerning the certified information being in Defendant's file at the time the plea was taken, however, on page 4, line 7 of the plea record, the Court refers to the Explanation of Rights and Plea of Guilty form, the first line of which reads: 'under the information filed against you in this case by the District Attorney of this County, you are charged with the crime of Robbery 2nd degree which is a class B felony.' This form was signed by the Defendant, his attorney and the Judge.

"Additionally, the affidavit of David Barber, District Attorney for the Tenth Judicial Circuit of Alabama, specifically addresses the procedure for introducing an Information in all cases when guilty pleas are taken, namely, that at the time of the plea a signed, certified Information is introduced and placed in the court file and an unsigned copy is retained in the District Attorney's file. That policy was apparently followed in the case under consideration as the State has produced their unsigned copy of the Information.

"The Defendant, in his colloquy with the Court, and with counsel present, stated that he fully understood the charges against him and all constitutional rights to which he was entitled.

"Based upon the above findings and an entire review of the Defendant's file in this case as well as a review of the requirements of Rule 28 of the ARCP, The Trial Courts Record Retention Schedule and the applicable law, this Court determines that it is a question of fact to be decided by this Court as to whether or not a certified information existed at the time Defendant's plea was taken.

"This Court determines that the evidence, when considered in its entirety, supports a determination in favor of the State and against the Defendant and finds that it had jurisdiction to take Defendant's plea in case number DC 91-842, that it was a valid plea and should not be set aside because the information was not in Defendant's file more than 9 years after the plea of Defendant and that Defendant's Rule 32 petition is due to be and the same is denied."

(C.R. 12-14.) The record supports the circuit court's findings; therefore, we adopt them as part of this memorandum. Accordingly, we affirm the district court's judgment.

McMillan, Cobb, Baschab, and Fry, JJ., concur.

IN THE DISTRICT COURT, TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
CRIMINAL DIVISION

MICHAEL GAGLIARDI	)	
	)	
PETITIONER,	)	
	)	
VS.	)	
	)	
STATE OF ALABAMA	)	
	)	
RESPONDENTS.	)	CASE NO. DC 91-842.60

ORDER ON DEFENDANT'S RULE 32 PETITION

This cause coming before the Court on Defendant's Petition for Relief Under Rule 32, Alabama Rules of Criminal Procedure and the State of Alabama's response thereto, argument presented and briefs received from both parties, the Court finds as follows:

1. The issue presented in this case is one of jurisdiction due to the record of conviction in DC 91-842 failing to contain a properly certified information for a grand jury indictment.

2. That both the State of Alabama and the Defendant agree that a certified "information" is not presently in Defendant's record. The State argues that said information was referred to in several other related documents made a part of Defendant's plea and also that an unsigned information is, in

fact, in the District Attorney's file indicating that at the time of the plea, an information was, in fact, in Defendant's file and that is sufficient to satisfy the question of jurisdiction and meets the requirement of The Trial Courts Record Retention Schedule. The Defendant argues that the requirement is specific and cannot be met indirectly by reference to other documents and that a certified information must actually be permanently retained in Defendant's record.

3. The Court reviewed the record of the colloquy between the Court and the Defendant when the plea of Defendant was taken and there is no direct reference by the Court concerning the certified information being in Defendant's file at the time the plea was taken, however, on page 4, line 7 of the plea record, the Court refers to the Explanation of Rights and Plea of Guilty form, the first line of which reads: "under the information filed against you in this case by the District Attorney of this County, you are charged with the crime of Robbery 2nd degree which is a class B felony." This form was signed by the Defendant, his attorney and the Judge.

Additionally, the affidavit of David Barber, District Attorney for the Tenth Judicial Circuit of Alabama, specifically addresses the procedure for introducing an Information in all cases when guilty pleas are taken, namely, that at the time of the plea a signed, certified Information is introduced and placed in the court file and an unsigned copy is retained in the District Attorney's file. That policy was apparently followed in the case under consideration as the State has produced their unsigned copy of the Information.

The Defendant, in his colloquy with the Court, and with counsel present, stated that he fully understood the charges

against him and all constitutional rights to which he was entitled.

Based upon the above findings and an entire review of the Defendant's file in this case as well as a review of the requirements of Rule 28 of the ARCP, The Trial Courts Record Retention Schedule and the applicable law, this Court determines that it is a question of fact to be decided by this Court as to whether or not a certified information existed at the time Defendant's plea was taken.

This Court determines that the evidence, when considered in its entirety, supports a determination in favor of the State and against the Defendant and finds that it had jurisdiction to take Defendant's plea in case number DC 91-842, that it was a valid plea and should not be set aside because the Information was not in Defendant's file more than 9 years after the plea of Defendant and that Defendant's Rule 32 Petition is due to be and the same is denied.

DONE and ORDERED this the 19th day of April, 2000.

/s/
R. O. Hughes
District Judge

A copy of this order is to be sent to Defendant's Attorney of Record and to Deputy District Attorney Carl Randall for the State of Alabama.

/s/
R. O. Hughes
District Judge

State v. Michael Lewis Gagliardi

CR-98-0630

COURT OF CRIMINAL APPEALS OF ALABAMA

747 So. 2d 366; 1999 Ala. Crim. App. LEXIS 139

May 28, 1999, Released

SUBSEQUENT HISTORY:

Rehearing Denied July 9, 1999. Released for Publication January 21, 2000. As Corrected January 24, 2000.

PRIOR HISTORY:

Appeal from Jefferson Circuit Court. (CC-94-2959.60). Tommy Nail, TRIAL JUDGE.

DISPOSITION:

REMANDED WITH DIRECTIONS.*

COUNSEL:

For Appellant: Bill Pryor, atty. gen., and James B. Prude, asst. atty. gen.

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* Note from the reporter of decisions: On September 10, 1999, on return to remand, the Court of Criminal Appeals affirmed, without opinion.

For Appellee: Carranza Mothershed Pryor, Birmingham.

JUDGES:

FRY, JUDGE. Long, P.J., and McMillan, Cobb, and Baschab, JJ., concur.

OPINIONBY:

FRY

OPINION:

[*366] FRY, JUDGE

On January 5, 1996, Michael Gagliardi, was convicted of robbery in the first degree, a violation of § 13A-8-41, Ala. Code 1975. Gagliardi was sentenced pursuant to the Habitual Felony Offender Act to life imprisonment without parole. Gagliardi's conviction was affirmed on direct appeal. *Gagliardi v. State*, 695 So. 2d 206 (Ala. Cr. App. 1996). We take judicial notice of the record on direct appeal. On May 21, 1998, Gagliardi filed a Rule 32, Ala. R. Crim. P., petition attacking his 1996 robbery conviction. In his petition, Gagliardi claimed, among other things, that his trial counsel was ineffective for failing to object to the use of a 1991 felony conviction to enhance his sentence because, he claimed, the 1991 conviction was not valid. Specifically, he argued that his 1991 conviction was not valid because the conviction was obtained without an information. On July 2, 1998, the circuit court entered an order denying Gagliardi's Rule 32 petition.

Gagliardi filed a motion to reconsider the petition, realleging his claim that his trial counsel was ineffective for not challenging the validity of the 1991 felony conviction. The State filed a response. On December 18, 1998, the circuit court conducted a hearing to consider the merits of Gagliardi's claim. The circuit court determined that in 1991 Gagliardi had pleaded guilty by information in the District Court of Jefferson County to robbery in the second degree. *See* Rule 2.2(e), Ala. [*367] R.Crim.P. However, during the hearing the State was unable to produce the information from the 1991 conviction. At the conclusion of the hearing, the circuit court found, that because the State could not produce the information, the 1991 conviction was not valid. The circuit court further determined that because the 1991 conviction was not valid, the use of that conviction to enhance Gagliardi's 1996 sentence was improper. The circuit court then vacated Gagliardi's sentence for life imprisonment without parole for his conviction of robbery in the first degree and resentenced Gagliardi to life imprisonment. The State appealed.

Rule 32.1, Ala. R. Crim. P., provides that "any defendant convicted of a criminal offense may institute a proceeding in the court of original jurisdiction to secure appropriate relief." (Emphasis added.) Moreover, a petitioner cannot at a subsequent proceeding attack the validity of a prior conviction that was used only to enhance the sentence under the Habitual Felony Offender Act. *See James v. State*, 681 So. 2d 269 (Ala. Cr. App. 1996).

Gagliardi's Rule 32 petition is a collateral attack on the validity of his 1991 guilty plea conviction. Therefore, the petition should have been filed in the court of original jurisdiction -- the Jefferson District Court.

"'A court's lack of subject-matter jurisdiction is fundamental, cannot be waived, and may be raised at any time.' *McKinney v. State*, 549 So. 2d 166, 168 (Ala. Cr. App. 1989). *See* Rule 15.2(d), A.R.Cr.P. Moreover, it is incumbent upon appellate courts to consider lack of subject-matter jurisdiction ex mero motu. *Ex parte Smith*, 438 So. 2d 766 (Ala. 1983)." *Pittman v. State*, 621 So. 2d 351, 352 (Ala. Cr. App. 1992). *Cf. Harvey v. City of Oneonta*, 715 So. 2d 779 (Ala. 1998). Because the Jefferson Circuit Court was not the court of original jurisdiction for Gagliardi's 1991 guilty plea conviction, that court was without jurisdiction to determine the validity of the 1991 conviction. Therefore, its actions in setting aside Gagliardi's 1991 conviction are void. This case is remanded to the circuit court with directions to reinstate the original sentence of life imprisonment without parole.

If Gagliardi wishes to challenge the validity of his 1991 guilty-plea conviction, he should file a Rule 32 petition in the court of original jurisdiction, the Jefferson District Court. Once that court has made a determination on the validity of the 1991 conviction, he can challenge the use of the 1991 conviction to enhance his 1996 sentence.

For the reasons stated above, this case is remanded with directions to the circuit court for actions consistent with the directions set forth in this opinion. A return to remand to this court shall be made within 21 days of this opinion.

REMANDED WITH DIRECTIONS.

Long, P.J., and McMillan, Cobb, and Baschab, JJ., concur.

STATE OF ALABAMA

IN THE CIRCUIT COURT FOR THE COUNTY OF JEFFERSON

TENTH JUDICIAL CIRCUIT

CRIMINAL

CASE NO. CC 94-2959

STATE OF ALABAMA,

Plaintiff,

vs.

MICHEL LEWIS GAGLIARDI,

Defendant.

CAPTION

THE ABOVE-STYLED CAUSE came on to be heard before the Honorable J. Richmond Pearson, Judge, at the Criminal Justice Center, Birmingham, Alabama, on the 18th day of December, 1998, commencing at 10:55 A.M., before Judy L. Bresnan, Court Reporter and Commissioner.

APPEARANCES

FOR THE STATE:
Mr. Carl Randall

Deputy District Attorney
801 21st Street North
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FOR THE DEFENDANT:
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THE COURT: For the record, my name is Carranza Pryor. The case is Michel Lewis Gagliardi versus the State of Alabama, case number CC 94-2959. This is a Rule 32 petition.

THE COURT: We've had prior hearings on this, have we not?

MR. PRYOR: You have, Your Honor.

THE COURT: Did y'all keep up with who the court reporter was? I don't know, but anyway, if you need it all. Go ahead.

MR. PRYOR: The issues after that first hearing before Your Honor were eliminated but for one and that was the petitioner's point that no information had been filed in a prior underlying conviction. This man had been convicted of first degree robbery in this court in 1996 and – –

THE COURT: In 1996?

MR. PRYOR: Yes, Your Honor.

THE COURT: First degree robbery?

MR. PRYOR: Yes.

THE COURT: Without an indictment you say?

MR. PRYOR: Without an infor – – your sentence was life without parole. The challenge is to one of the underlying convictions.

THE COURT: All right. That it was based on?

MR. PRYOR: Yes, Your Honor. This was a conviction or a plea before Judge Jack Montgomery in 1991 that we are challenging. It was a plea. He entered a plea of guilty, however we're concerned that no information was filed in that case.

THE COURT: I remember it now. The record doesn't show that an information was filed in that case?

MR. PRYOR: Correct, Your Honor.

THE COURT: All right. Mr. Randall.

MR. RANDALL: Your Honor, everything Mr. Pryor said is exactly correct to the extent that he went. The district court file was imaged sometime back, as you know the clerk's office does. They no longer have the file. They take pictures of it or whatever technology – –

THE COURT: But don't they – – wouldn't whatever, microfiche or whatever it is, shouldn't it reflect what happened?

MR. RANDALL: It should, Your Honor. However, for whatever reason, when they go back to unimage it or put it on paper or whatever technological term you want to use – –

THE COURT: They can't half read it?

MR. RANDALL: Well, no. There's no information in there. However, we did a search of the district attorney's files, and I had an affidavit done by Mr. Barber who was district attorney at that time and is, as you know, still district attorney over this circuit, and we found three documents of note. And we would like to enter those – –

THE COURT: Have you shown them to him?

MR. RANDALL: Yes, sir, I have, and also I've provided a copy.

THE COURT: Sure, sure. What do these documents – –

MR. RANDALL: Your Honor, two of these documents are filed in district court whenever a person wants to plead guilty and those would be specific to this case. The third document, Your Honor, is, as Mr. Barber tells you in his affidavit, that the way our office operates is when we get those documents from the court, we prepare an information. And the deputy district attorney in that district court will sign one and retain the other one in our files.

Your Honor, that would be the retained one and I guess the state's – –

THE COURT: Which one, the information here?

MR. RANDALL: Yes, sir. The little paper with the red tab on it.

THE COURT: All right.

MR. RANDALL: And what the state's contention is is that by showing you this document and the other two attached is that in fact an information was filed at the time, however it has been lost in the seven years since then.

We acknowledge that an information had to have been filed for Judge Montgomery to have jurisdiction over the case itself. However, the Court does not retain jurisdiction by means of such a document. It retains jurisdiction by means of the actual conviction. So I guess the state's argument is that – –

THE COURT: Well, wait a minute. How do you reach that that they retain -- – did you use the term retain?

MR. RANDALL: I did use the term retain.

THE COURT: By the actual conviction?

MR. RANDALL: By the conviction itself, yes, sir.

THE COURT: How can the court pull itself up by its own bootstrap?

MR. RANDALL: I'm sorry, Your Honor. I wasn't trying to make a bootstrap argument.

THE COURT: Well, you said that jurisdiction is gotten by the fact that the court entered a conviction.

MR. RANDALL: No. I was trying to say the court retains jurisdiction by entering the conviction. It got jurisdiction – –

THE COURT: That's the reason I asked you about the word retain. What do you mean retain?

MR. RANDALL: Meaning – – the state's argument is that if some document is lost out of that file five, ten or fifteen years later, it doesn't mean the conviction isn't good and it doesn't mean that it wasn't there at the time.

THE COURT: Oh, you're saying that this is still down there?

MR. RANDALL: What I'm saying is that document from the evidence we can show at least circumstantially was filed, however it's been lost by someone in a paper shuffling process.

THE COURT: Let me ask you this. Wouldn't that be an assumption?

MR. RANDALL: It's definitely my assertion. I mean and i – –

THE COURT: But what I'm saying, wouldn't it be incumbent upon the state to show that the law was complied with fully?

MR. RANDALL: I believe, Your Honor, that when I guess we're five or six years down the line that the fact that there is a valid conviction, I think that there's got to be some presumption that it was done correctly because – –

THE COURT: Well, see, when you say a valid conviction, that begs the question. You skipped over – – you could say when there is a conviction on record, but whether it's valid is what he's hollering about I gather.

MR. RANDALL: Yes, sir.

THE COURT: I gather.

MR. PRYOR: Yes, sir.

MR. RANDALL: That's exactly it. And I guess what the crux of this matter comes down to is that – –

THE COURT: I don't doubt that Mr. Barber did everything he was supposed to do, but wouldn't the case record speak for itself?

MR. RANDALL: Your Honor, what we're trying to say is that the record is no longer complete because of the ravages of time.

THE COURT: Do you have any case law that time can justify – –

MR. RANDALL: Your Honor, there is no case law I found on either side of that point.

THE COURT: I know but the law is clear – –

MR. RANDALL: Mr. Pryor may have – –
THE COURT: The law is clear that you have to justify holding somebody, don't you?

MR. RANDALL: Yes, sir, you do. And my understanding is – – the closest I've been able to come is that in using a prior conviction against somebody, the docket sheet itself can be sufficient proof of a valid conviction.

THE COURT: I don't doubt that the docket sheet, and I agree with you that the docket sheet itself is – – would speak for itself except that it doesn't speak for whether or not an information, if that is jurisdictional, whether that was ever there. Does the docket sheet say there was an information filed?

MR. RANDALL: The docket sheet does not have a specific entry, however it does say in part of the paperwork

based upon the information filed – – as charged by information filed by the district attorney. However, to be very fair, there is no – –

THE COURT: Information.

MR. RANDALL: Well, there's no information and also there's no minute entry in handwriting that an information was filed.

THE COURT: This is a form docket sheet?

MR. PRYOR: Yes, Your Honor.

MR. RANDALL: This is a form docket sheet.

THE COURT: Well, Mr. – –

MR. PRYOR: Pryor?

THE COURT: No, have a seat. Mr. Randall?

MR. RANDALL: Yes, sir, Your Honor.

THE COURT: It would be the thinking of this court unless there is something – – I don't doubt that the district attorney didn't do this paperwork but the record is void of an information which is essential. I had a case like this, I can't think of the name of it, out of Walker County.

Do you remember it?

THE BAILIFF: Yes, sir.

THE COURT: What's the name of it? Where the guy got life without and then they went back and Judge Brotherton, wasn't it – –

THE BAILIFF: Yes, sir. Judge Brotherton is the one that sent it back, Judge.

THE COURT: – – redid one of his prior convictions which I used – – I mean at that time but he came back later and redid it based on something and then I set it aside. But I would think that the custody of the file and all that is in the bosom of the state and not the defendant.

What would be the difference – – that has nothing to do with my ruling but I think he's entitled to relief without that information. What's the difference in the sentence?

MR. RANDALL: The difference in the sentence would be life versus life without.

THE COURT: I've heard this several times so I give you the right to appeal it, but I'm going to rule that in the absence of any affirmative showing that there was an information in this case, and especially in light of the fact that the word information is on a form, that the defendant is entitled to the relief prayed for.

MR. RANDALL: Yes, sir.

THE COURT: That will bring it to at least where y'all can do whatever y'all want to do about it.

MR. RANDALL: Yes, sir. May I mark those three documents as State's 1, 2 and 3 and enter them as part of the record?

THE COURT: Sure. Give it to her.

(Whereupon, State's Exhibits 1-3 were marked for identification.)

END OF PROCEEDINGS